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Utah Court of Appeals

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Heidi E. C. Leithead; Parr, Waddoups, Brown, Gee and Loveless; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STEPHEN CLARKE,	:	
	:	**APPELLANT'S BRIEF**
Appellant,	:	
vs.	:	
	:	**Case No. 20040381-CA**
LIVING SCRIPTURES, INC., a Utah Corporation,	:	
	:	
Appellee.	:	

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FILED
UTAH APPELLATE COURTS
OCT 07 2004

List of All Parties:

Appellant:	Stephen Clarke
Represented by :	Robert D. Rose
Appellee:	Living Scriptures, Inc.
Represented by:	Heidi E. C. Leithead

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JURISDICTIONAL STATEMENT

Jurisdiction is granted to the Utah Court of Appeals pursuant to Rule 3 and Rule 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND THE STANDARD OF REVIEW

Statement of Issues: The sole issue is a determination of when the statute of limitations begins to run on the termination of a contract of employment: at the time of the notification of intent to terminate or upon

the actual date of termination when the last work is completed by the employee and separation is complete.

Standard of Review: "Because the propriety of a 12(b)[(6)] dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard." *Ramsey v. Hancock*, 79 P.3d 423, 424 (Utah App. 2003). "In its review, this court 'must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims.'" Id.

STATUTORY PROVISIONS

Utah Code ¶78-12-23 sets forth the statute of limitations for a breach of written contract.

STATEMENT OF THE CASE

This is a breach of a contract of employment action in which Appellant claims damages arising from Appellee's breach of the written terms for termination under the contract of employment.

The trial court granted Appellee's 12(b)(6) motion to dismiss on the grounds that Appellant's filing of the complaint was five days over the six year statute of limitations for breach of a written contract.

STATEMENT OF THE FACTS

1. In 1986, Appellant Steven Clarke (Clarke), took employment with Appellee Living Scriptures (Living) as a salesman selling religious books and audio-visual materials door to door. (complaint, ¶ 5)

2. Through his work and enthusiasm for products of Living, Clarke was able to make a good living by working full-time with Living (complaint, ¶9)

3. Fo the first eleven years of Clarke's association with Living, he was an at-will employee working without the benefit of a written contract. On 7 April, 1997, Clarke signed a written contract with Living which set out Clarke's duties, established his compensation package and classified Clarke as an independent contractor, responsible for his own taxes.

4. The written contract was for a term of one year, automatically renewed yearly unless terminated by either party, with Living granted the right to terminate only as stated in paragraph 10 of the employment contract:

> The Company may terminate this Agreement upon the Salesman's failure to abide by the terms hereof or upon his failure to meet the minimum sales requirement, which is $3,000 of merchandise per month.

(complaint, ¶20).

5. After signing the contract, Clarke not only continued working as he had before entering into the contract, i.e., selling company materials door

to door, but in August of 1997, he became a manager of Living, recruiting salespersons, giving on the job training and consulting with upper management of the company, frequently traveling to the company head-quarters in Ogden, Utah. (complaint, ¶ 14).

6. In connection with his newly acquired responsibilities, Clarke was encouraged to and did renovate his home garage into an office at a cost of $21,508.99. (complaint, ¶ 13)

7. Between August of 1997 and December of 1997, numerous oral and written representations were made by Living to Clarke assuring him that he was now in management, that he would be a participant in a company profit sharing plan, and that Living recognized that he was working long and hard hours preparing for the coming summer sales season. (complaint, ¶26).

8. On December 9, 1997, without any prior notice, warning or caution, Clarke was handed a written notice of termination which specifically referred to the written independent contractor agreement of 7 April, 1997, and which notice stated that his employment with Living was terminated, effective in 15 days, or December 24, 1997. (complaint, ¶28)

9. The notice of termination further stated:

> Please prepare and submit to us a list of all pending, unfinished business involving sales of Company products.

10. During the following 15 days, Clarke continued at his duties, compiling the list of pending and unfinished business, and finished his employment relationship with Appellee on December 24, 1997.

11. The complaint in this matter was filed on or about December 17, 2003, one week short of six years after Living's termination of the written contract.

12. Subsequently, the trial court dismissed Appellant's complaint on the grounds tha' the statute of limitations ran on the Appellant's breach of contract cause of action on December 9, 2003, the month and day that the notice of termination was handed to Clarke.

SUMMARY OF ARGUMENTS

1. CLARKE WAS WITHIN THE STATUTE OF LIMITATIONS FOR CONTRACTS AS THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN FROM THE DATE OF NOTICE OF TERMINATION, BUT FROM THE ACTUAL DATE OF TERMINATION OF WORK.

This appeal focuses on whether Clarke filed his complaint against Living within the six year period of time required to file a complaint for breach of a written contract. By ruling that the statute of limitations started to run on December 7, 1997, the trial court found that Clarke did not have the right to proceed with his lawsuit against Living, stating that the complaint was filed outside the six years allowed to pursue a claim upon a written contract.

ARGUMENT

A. Statutory Basis for Claim: Utah Code ¶78-12-23 sets forth the standard for the six year statute of limitations:

> **Within six years -- Mesne profits of real property -- Instrument in writing.**
> An action may be brought within six years:
> (1) for the mesne profits of real property;
> (2) upon any contract, obligation, or liability founded upon an instrument in writing . . .

Clarke argued to the trial court that the statute of limitations did not start to run until December 24, 1997 which is fifteen days after the notice was given and was the effective date of termination actually set forth in the notice and was the date of Clarke's last work performed for Living.

B. A Written Contract Existed Binding Clarke and Living:

1. A written contract prepared by Living and signed by both Living and Clarke was signed by the parties on 7 April, 1997.

2. The parties abided by the terms of the written contract to the extent that Living followed its terms and conditions when terminating Clarke by giving him fifteen days written notice before the termination was effective.

C. When Does the Statute of Limitations On a Breach of Contract Claim Begin to Run?

1. In *DOIT, Inc. v. Touche, Ross &Co.* 926 P.2d 835, 843 (Utah 1996) DOIT was a group of depositors of failed Utah thrift institutions who sued the thrifts' accountants, advisors and officers under various theories of misfeasance and malfeasance. Defendants raised the defense of the running of the statute of limitations and the Court states:

> Under Utah law, a statute of limitations begins to run against a party when the cause of action accrues. . . . As a general rule, a cause of action accrues when a plaintiff could have first filed and prosecuted an action to successful completion." Id. at 843.

The Court examined the last possible date that a cause of action could accrue, which date was the last date an accountant's report was disseminated, and concluded that plaintiffs were nearly four years too late in filing the complaint. According to the reasoning in *DOIT*, it was the damaging effectiveness and negative impact of the false report which triggered the statute of limitations. Immediately upon dissemination of the false reports, the damage began to accrue to the DOIT plaintiffs. The plaintiff could have then immediately instituted a lawsuit based upon the fact that all the elements of a claim for fraudulent misrepresentation were present and therefore, the statute of limitations began to run.

In the instant case, the damaging impact of the notice of employment termination, which notice itself required Clarke to perform additional tasks

and duties, did not take place until fourteen days after its issuance when the impact of the termination letter was effective. Before Clarke could file a claim for breach of contract, the contract had to be terminated so completely and absolutely that Clarke could legally claim that his rights under the employment contract were eliminated. At any time prior to the effective date, Living could have changed their mind and canceled the termination Because Clarke had continuing responsibilities under the notice to:

> prepare and submit to us a list of all pending, unfinished business involving sales of Company products.

his duties were not finished, he continued to be responsible to Living, he was accountable for his actions and any claim for breach of contract was not ripe.

b. *Davidson Lumber v. Bonneville Investment*, 794 P.2d 11, 19 (Utah 1990) states:

> "The general policy in Utah is that statutes of limitations commence to run when the cause of action accrues. . . . A tort cause of action accrues when it becomes remediable in the courts, that is, when all elements of a cause of action come into being.

Plaintiff sought indemnification from defendant for damages arising from a defective wooden laminated beam which defendant manufactured and plaintiff sold. The beam caused the collapse of a building and plaintiff was required to pay damages arising from the defective beam. Defendant claimed that the cause of action arose when the beam collapsed, but the

Court ruled that the cause of action for indemnification arose only when plaintiff was required to pay for the damages which arose from the collapse of the beam. Until plaintiff was required to pay, there was no cognizable claim for indemnification by plaintiff against defendant, therefore, payment was an essential element of the claim for indemnification. When Davidson was absolutely bound to pay the third party claim, then all the elements needed for the cause of action accrued and only then did the statute of limitations begin to run.

The case at bar bears a striking resemblance to *Davidson*, for until Clarke's employment actually ceased, that is, ended, finished, completed, concluded and defunct, no cause of action arose for Clarke to file a claim against Living. If Davidson had filed suit prior to being compelled by a court of competent jurisdiction to pay damages to the physically injured third party, Davidson's claim would have been dismissed, not having yet accrued for no one could divine whether Davidson would actually incur any damages, i.e., whether a judgment would be rendered against Davidson for selling a defective product. The basis for the dismissal would be speculative damages, for there was no knowledge by any party concerning the actual amount of damages. While there was the assumption that Davidson would be responsible to pay some measure of damages, until the

court actually handed down the judgment, until the court actually and physically decreed that Davidson was liable for a definite amount of damages suffered by the physically injured person, there was no cause of action by Davidson against the defendant. Regardless of the expectations of a judgment, an anticipated judgment is simply that: anticipated, and cannot be the basis for a lawsuit until the judgment actually exists.

Such is the case at bar: when the termination notice was presented to Clarke, the notice stated that Clarke had two weeks of work left at Living. If, perhaps, on the third day of the two week period, Clarke filed suit alleging breach of contract and sought an injunction prohibiting Living from carrying out the threat of termination, Clarke's claim would have been quickly dismissed by the court, for no cause of action had accrued and no damages had yet been incurred for termination was not complete, damages had not ripened and an actionable injury was not present. There was the threat of injury and damage, but a threat does not ripen into a cause of action under a breach of contract claim. For instance, Living could have withdrawn the notice of termination, the parties could have negotiated a new contract, they could have reaffirmed the existing contract or they could have extended the deadline for cessation of employment. But when the eventful fourteenth day melded into the fifteenth day, Clarke then was unequivocally

terminated, the terms of his contract were void and he then had as his prized possession not an employment contract, but an accrued cause of action for breach of contract and various torts.

Thus, it is vital that the lessons of *Davidson* be preserved in the instant case, for it states that the statute of limitations does not begin its intractable march on time until that sometimes elusive cause of action actually and fully accrues.

c. *Retherford v. AT&T Communications* 844 P.2d 949, 975 (Utah, 1992) affirming the findings of *Davidson*, opines that:

> Under Utah law, the statute of limitations begins to run when the cause of action accrues. . . . In order to determine when the limitations period began to run, then, we must determine when each of the causes of action became actionable in the courts.

Retherford asserted tort claims against defendants for on the job sexual harassment. The *Retherford* court, following the dictates of *Davidson*, *supra*, examined when all the elements required to prosecute a claim for the tort of sexual harassment were final and actionable. Unable to find judicial fiat declaring when all the elements of retaliatory harassment accrue, the Court uses the tort of alienation of affections as a comparative cause of action, and states:

> Applying this standard by analogy, we hold that the statute of limitations for intentional infliction of emotional distress does not begin to run until the distress is actually inflicted, i.e., when the plaintiff suffers severe emotional disturbances.
>
> Although easy to describe, this standard is difficult to apply, particularly because the element of emotional distress is specific to the plaintiff in each case. Id. at 975.

Thus a sexual predator may undertake his nefarious acts on day one, but if the ill effects of his actions do not begin to inflict the victim with pain and agony and illness until day fifty, then the particular cause of action does not accrue, begin to run or create the conditions for the start of the statute of limitations until the damage is felt and experienced on that fiftieth day.

The Court then carefully examines the time line relating the claim of intentional infliction of emotional distress and establishes a date when the cause of action for intentional infliction accrued. Then the court examines the elements for plaintiff's negligent employment claim and states:

> Thus, as a general matter, the statute of limitations will not begin to run on a cause of action for negligent employment until all the elements of the employee's tort are present. Id. at 977.

The conclusion sustained by the *Retherford* court is that a cause of action does not accrue, regardless of the nature of the claim, until all actionable elements on the cause of action are complete and present.

d. *Brigham Young University v. Paulsen Construction* 744 P.2d 1370 (Utah, 1987) Brigham Young sued the contractor which had constructed certain on-campus buildings some five years earlier. The trial court dismissed the case, stating that a three year statute of limitations (Utah Code ¶78-12-26(1) controlled the case, but the Utah Supreme Court determined that the controlling statute was the six year Utah Code ¶78-12-23(2). Regarding the application of the statute of limitations, the Supreme Court states:

> The general rule is that a cause of action accrues upon "the happening of the last event necessary to . . . the cause of action. Id. at 1373.

In the case at bar, the "last event necessary to the cause of action" was the final act of Clarke, on December 24, leaving the association of Living for the last time, having completed his duties set out in the notice of termination and having failed to convince Living to change its decision to terminate. It is not until that very last act, that final break with the employer, that the cause of action accrues and the statute of limitations clock begins to run. Living would have us believe that the singular event of giving the notice of termination was the last event necessary to happen starting the running of the statute, but common experience and the following precedential cases from California tells us otherwise.

e. *Romano v. Rockwell International, Inc.* 926 P.2d 1114 (Cal. 1996). Romano was a 29 year employee of Rockwell International in the human resource department when one of his superiors became displeased with Romano and asked for his termination. Romano's immediate supervisor discussed with Romano the intent of the superior officer to fire Romano and suggested that Romano accept a one year teaching fellowship and then retire upon reaching 85 service points under the company's service plan. Romano understood that as of December 6, 1988, he was notified that he would be terminated, and that such termination was going to take place no later than May 31, 1991. Romano tentatively agreed to the plan, but never signed any document and did make some effort to reverse the decision of termination. No replacement for Romano was hired until December of 1989 at which time Romano was moved to another area of the company until May of 1990 when he began the teaching fellowship, retiring on May 31, 1991.

Romano filed a complaint with the California Department of Fair Employment in September of 1991 and then filed a complaint with the court on December 9, 1991, alleging wrongful termination, retaliatory termination, breach of implied contract, breach of implied covenant of good faith and fair dealing and intentional interference with contractual relations.

Rockwell successfully pursued summary judgment at the trial court on the grounds that all of Romano's claims were barred by applicable statutes of limitations, claiming that Romano's causes of action ran from December 6, 1988 when he was first notified that he was being terminated. Romano argued that the actual date of termination, or May 31, 1991 controlled the date when the causes of action accrued, but the trial court and the intermediate court of appeal disagreed, siding with Rockwell.

In analyzing the contesting points of view, the California Supreme Court first states that "A cause of action for breach of contract does not accrue before the time of breach." Id. at 1119 and that "There can be no *actual* breach of contract until the time specified therein for performance has arrived." (emphasis in original). Id. and "When the promisor repudiates the contract before the time for complete performance is complete, then there is an anticipatory breach occurs." Id. The court then states:

> In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies-he or she may "treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercises his [or her] remedies for actual breach if a breach does in fact occur at such time. *Romano,* supra at 1119.

Addressing the issue of the running of the statute of limitations, the *Romano* court states:

> in the event the plaintiff disregards the repudiation, the statute of limitations does not begin to run until the time set by the contract for performance. . . . As Professor Corbin has explained,
>
> > "For the purpose of determining when the period of limitations begins to run, the defendant's non-performance at the day specified may be regarded as a breach of duty as well as the anticipatory repudiation. The plaintiff should not be penalized for le ving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately. 4 Corbin Contracts, (1951 ed.) ¶989, p. 967. *Romano*, supra. at 1120.

Romano, the plaintiff, did disregard the notice of termination on December 6, 1988 and kept working, in the interim allowing Rockwell the opportunity to withdraw its notice of termination, which, to Romano's dismay, did not happen. During the intervening time, Romano worked and carried out his duties as required by Rockwell, therefore indicating that Romano elected to rely on the contract despite the breach of implied contract.

As stated by the court"

> Indeed, whether the breach is anticipatory or not, when there are ongoing contractual obligations the plaintiff may elect to rely on the contract despite a breach, and the statute of

> limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract. . . . Romano continued to perform and accept compensation until the time of actual termination, reflecting an election to treat the contract as still in effect. Id. at 1120.

The *Romano* court concluded that the applicable statute of limitations did not begin to run until the actual date of the termination of Romano's employment, i.e., May 31, 1991 and that the statute of limitations had not run against him.

This landmark California case is very similar to the case at bar: Clarke received the notice of termination, or the anticipatory breach of the contract, on December 9. He elected to not act on the breach, leaving to Living the opportunity to retract its wrongful breach of the employment contract, but when Living did not seize the opportunity to make right its anticipatory breach of contract, Clarke dutifully left employment on December 24 which is the date that the final element of the breach of contract finally accrued.

f. *Kasco Services Corp v. Benson*, 831 P.2d 86 (Utah 1992) concerns an employee who had signed an employment contract promising not to compete against the employer for eighteen months after termination within the existing territory. Six years later, the original employer, Keene, merged with Kasco and Kasco sent new employment contracts to all the employees

for their signatures and the new contracts contained non-competition provisions similar to the former contracts. When presented with the new contract in August of 1988, Benson, who was one of the top salesmen in the company, refused the sign the new contract, proclaiming that he considered the noncompetition provisions to be null and void. However, he kept working until March 15, 1989 when he gave written notice of his resignation, effective March 1, 1989.

He immediately established a company competing with Kasco and Kasco moved for the issuance of preliminary injunction based on the noncompetition agreement. The trial court granted the preliminary injunction, but ruled that the eighteen month period started from August of 1988 when Benson indicated that he would not abide by the noncompetition agreement and refused to sign the new employment contract, therefore putting Kasco on notice that Benson would not abide by the terms of the restrictive non competition agreement.

The Utah Supreme court determined there was an anticipatory breach of the noncompetition agreement:

> An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent to not render its promised performance when the time fixed for it in the contract

arrives." Id. at 89, citing *Hurwitz v. David K. Richards Co.* 436 P.2d 794, 796 (1968).

Further, the *Kasco* court, agreeing with the principals of law set out in *Romano, supra,* states :

> The other party can immediately treat the anticipatory repudiation as a breach, or it can continue to treat the contract as operable and urge performance without waiving any right to sue for that repudiation. . . . Our court of appeals recently noted:
>
> > A party that has received a definite repudiation from the breaching party to the contract should not be penalized for its efforts to encourage the breaching party to perform its end of the bargain. (emphasis added) *Breuer-Harrison, Inc. v. Combe* 799 P.2d 716, 725 (Utah App 1990). *Kasco,* supra at 89.
>
> . . .
>
> We need not decide here whether Benson's announcement that he did not intend to abide by the noncompetition covenant was an anticipatory repudiation. It makes no difference in this case. If his remarks were an anticipatory repudiation, Kasco simply had an election. It could treat the remark as a breach, or it could continue to treat the contract as operable and encourage performance with waiving any rights under the contract. If there was no anticipatory repudiation, the noncompetition covenant remained in full force. Therefore, anticipatory repudiation or not, it was error for the trial court to rule that the eighteen months began to run when Kasco was put on notice of Benson's intent not to comply with the restrictive covenant. The beginning time should have been the actual date of Benson's resignation. Id. at 89.

Again, referring to the facts of the instant case, the termination of Clarke's employment, the actual, not anticipatory breach of the contract,

took place on December 24, the actual date of Clarke's cessation of services for Living.

g. *Mullins v. Rockwell International* 936 P.2d 1246 (Cal. 1997). Mullins was a 22 year employee of Rockwell and became a factory manager when an antagonistic person, Rubenstein, became president of the division. In January of 1988, Rubenstein consolidated factories and demoted Mullins to the position of project manager over an essentially non-existent project. Mullins was excluded from management meetings, was not allowed to interview for new positions, had his compensation substantially reduced and suffered humiliation and distress. By October of 1989, he retired.

He filed a lawsuit in September of 1991, alleging constructive discharge, wrongful termination, breach of covenant of good faith and fair dealing and breach of oral employment contract. Rockwell moved for summary judgment on the issue of the running of the statute of limitations, claiming that the two year statute began to run when Mullins had notice of his demotion in January of 1988. The California Supreme Court disagreed, and summarized its decision in *Romano*, supra:

> We noted that in a contract action, the statute of limitations does not begin to run before the alleged breach occurs, and that the breach of promise alleged in *Romano* consisted of the *termination* of employment without good cause. . . . In addition,

> we observed that even if the notification of termination in that case were viewed as a breach of the employment contract, such notification constituted an anticipatory breach that gave the plaintiff an election of remedies. . . . The plaintiff could elect to sue on the breach at once, or he or she could elect to continue to perform until the beach announced by the defendant came to pass. Because the plaintiff in *Romano* elected to continue to perform, we concluded that the statute of limitations began to run when the defendant's announced breach actually came to pass, that is, when employment terminated. *Mullins* at 1249, (citations omitted)

The Court examines the elements of constructive discharge, which is not at issue in the case at bar, and discusses the virtues and disadvantages of using various dates to determine when the statute of limitations begins running. The rule stated out by the Court is:

> The statute of limitations should not force the employee to institute premature legal proceedings, whether at the time the employer announces an intention to fire the employee, or at the time the employer begins to coerce a resignation by creating or knowingly permitting intolerable working conditions [cite] Finally, a rule providing that the statute of limitations begins to run on the date of actual termination of employment has the virtue of certainty. Id. at 1250.

And so should not this Court impose upon employees the burden of instituting premature legal proceedings before the employee and employer have the opportunity to reconcile, to negotiate, to come to terms, but rather allow the statute of limitations to run from the actual date of the complete cessation of an employee-employer relationship.

CONCLUSION

The core of the argument is simply whether upon a breach of contract of employment, the statute of limitations begins to run from the date that the employee is informed of the intention to complete the firing, or whether it begins to run upon the date that the termination is complete and final. Utilizing the principals enunciated in Utah law that a cause of action only begins to accrue when all the elements of the cause of action have occurred, supplemented by the well-considered California cases above which reason that the notice of termination is but an anticipatory breach, subject to revocation and that the statute of limitations begins to run upon the event of the actual and final termination, it is clear in this matter that the statute of limitations for Clarke began to run on the last day of his employment, December 24 and that his filing of the complaint in this matter was within the applicable statute of limitations.

Therefore, this matter should be remanded to the trial court with instructions that Appellee is to file an answer and this matter should continue to trial on the merits.

Dated this 7 day of October, 2004.

ROBERT D. ROSE, Attorney for Appellant

PROOF OF SERVICE

I certify that I delivered a true and correct copy of the foregoing Appellant's Brief to:

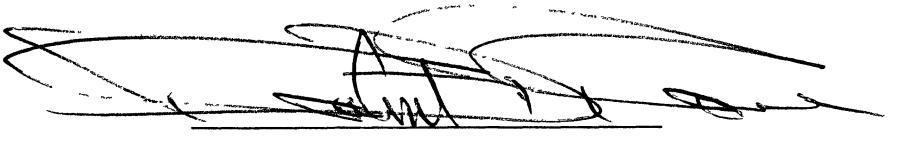
Heidi E. C. Leithead

Parr Waddoups Brown Gee & Loveless

185 South State, Suite 1300

Salt Lake City, Utah 84111

on the 7th day of October, 2004.



FILED DISTRICT COURT
Third Judicial District

APR 12 2004

SALT LAKE COUNTY
By
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

STEPHEN CLARKE, Plaintiff, vs. LIVING SCRIPTURES, INC., a Utah corporation, Defendant.	)	~~[Proposed]~~ **ORDER OF DISMISSAL WITH PREJUDICE** Civil No. 030928443 Judge Stephen L. Henriod

---

This matter came on for hearing before the Honorable Stephen L. Henroid on the 12 day of April, 2004, at 2:00 o'clock p.m. Plaintiff was represented by his counsel of record, Robert D. Rose. Defendant was represented by its counsel of record, Heidi E. C. Leithead and the law firm of Parr Waddoups Brown Gee & Loveless. Having reviewed the memoranda filed by the parties and having heard oral argument thereon and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this matter shall be and the same hereby is dismissed with prejudice on the ground that, based on the facts alleged in the Complaint and all reasonable inferences drawn therefrom in favor of plaintiff,

A. Plaintiff's First Cause of Action (Breach of Employment Contract) is barred by the six-year statute of limitations set forth in Utah Code Ann. § 78-12-23.

B. Plaintiff's Second Cause of Action (Unjust Enrichment), Third Cause of Action (Detrimental Reliance), Fourth Cause of Action (Bad Faith), and Sixth Cause of Action (Lost Business Opportunity) are barred by the four-year statute of limitations set forth in Utah Code Ann. § 78-12-25.

C. Plaintiff's Sixth [sic] Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing) is barred by the six-year statute of limitations set forth in Utah Code Ann. § 78-12-23 and/or by the four-year statute of limitations set forth in Utah Code Ann. § 78-12-25.

D. Plaintiff's Fifth Cause of Action (Fraudulent Misrepresentation of Present Existing Facts] is barred by the three-year statute of limitations set forth in Utah Code Ann. § 78-12-26.

E. Plaintiff's Seventh Cause of Action (Punitive Damages) is barred on the ground that, because each of plaintiff's claims sounding in tort are barred by the

applicable statutes of limitation, plaintiff cannot allege a tort cause of action to support a claim for punitive damages against defendant.

ENTERED this 12 day of April, 2004.

BY THE COURT:

Stephen L. Henriod
District Court Judge

APPROVED AS TO FORM:

Robert D. Rose
Attorney for Plaintiff

Heidi E. C. Leithead
Parr Waddoups Brown Gee & Loveless
Attorneys for Defendant